



# ACLU

AMERICAN CIVIL LIBERTIES UNION  
of MICHIGAN

American Civil  
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April 30, 2009

Chief Justice Marilyn J. Kelly  
Clerk of the Court Corbin Davis  
Michigan Supreme Court  
P.O. Box 30052  
Lansing, MI 48909

VIA E-MAIL AND  
FEDERAL EXPRESS

Re: Proposed Amendment to Michigan Rules of Evidence 611  
ADM No. 2007-13

Dear Chief Justice Kelly and Mr. Davis:

This comment opposes the proposed amendment to Michigan Rule of Evidence 611 ("MRE 611") because it will allow judges to unconstitutionally close the doors of the courthouse to Michigan citizens based upon their religiously-mandated dress. It is submitted by the American Civil Liberties Union of Michigan and supported by a diverse group of organizations and individuals including: the American-Arab Anti-Discrimination Committee of Michigan, the American Jewish Congress, the Arab Community Center for Economic and Social Services, the Baptist Joint Committee for Religious Liberty, the Council on American-Islamic Relations (Michigan), First Step, the Jewish Council for Public Affairs, KARAMAH, Professor Douglas Laycock, Legal Services of South Central Michigan, Professor Ashley Lowe, the Michigan Coalition Against Domestic and Sexual Violence, the Michigan Conference of the United Church of Christ, the Michigan Immigrant Rights Project, the Michigan Poverty Law Project, SafeHouse Center and Turning Point.

As it is currently written, the proposed amendment to MRE 611 reads as follows:

The court shall exercise reasonable control over the appearance of parties and witnesses so as to (1) ensure that the demeanor of such persons may be observed and assessed by the fact-finder, and (2) to ensure the accurate identification of such persons.

The ACLU strongly encourages the Court to add the following language to the end of the proposed amendment so that it comports with our Constitution:

Provided, however, that no person shall be precluded from testifying on the basis of clothing worn because of a sincerely held religious belief.

This provision clarifies that judges may not violate the religious freedom rights of parties or witnesses by forbidding them from testifying based on their religious dress. As described below, this addition will render MRE 611 constitutional while continuing to satisfy the compelling interests of the State.

## THE PROPOSED AMENDMENT AND ITS PURPOSE

At first glance, the plain language of the amendment may seem fairly innocuous. However, the staff comments make clear that the rule was proposed specifically to authorize judges to bar Muslim women whose religious beliefs require them to wear a veil when men are present from testifying in court unless they remove the veil. According to the comments, the amendment “was suggested in response to a case in which a district judge was sued for dismissing a plaintiff’s case following the plaintiff’s refusal to remove her hijab during testimony.”<sup>1</sup>

The case referenced in the comment involved a small claims dispute between Ms. Ginnah Muhammad and the Enterprise Leasing Company before a Hamtramck district court judge. During the hearing, the judge told Ms. Muhammad that she would have to remove her niqab to facilitate an evaluation of her credibility. In response, she explained “I’m a practicing Muslim and this is my way of life . . . . I can’t follow that order.” The judge informed Ms. Muhammad that she could either remove her veil or have the case dismissed. Ms. Muhammad refused to violate her religious beliefs, and as a direct result, her case was dismissed. Ms. Muhammad later sued the judge for violating her religious freedom, but the case was dismissed on jurisdictional grounds without reaching the merits of the claim. See *Muhammad v. Paruk*, 553 FSupp2d 893, 899-901 (ED Mich 2008).

The proposed amendment to MRE 611 is intended to authorize judges to do exactly what the Hamtramck District Court judge did: forbid women who for religious reasons refuse to remove their veils from testifying in court. To fully comprehend the consequences of this potential result, it is critical to underscore the religious significance of the veil for some Muslim women. Some Muslim religious leaders interpret a series of passages in the Quran to mandate that women wear a hijab, niqab or burka<sup>2</sup> as a requirement of modesty whenever they are in the presence of a man who is not their husband or close relative. See Muslim Women’s League, *An Islamic Perspective on Women’s Dress*, available at <http://www.mwlnusa.org/topics/dress/hijab.html>. Although not all Muslim women adopt this interpretation, for those who do, wearing a veil is a core tenet of their religious belief and an “essential component of their identity as a practicing Muslim.” Paul Chambers, *Contentious Headscarves: Spirituality and the State in the 21<sup>st</sup> Century*, in *A SOCIOLOGY OF SPIRITUALITY* 127, 130 (Kieren Flanagan & Peter C. Jupp eds., 2007). Indeed, one study conducted amongst British Muslim women revealed that over 80% of hijab-wearing women consider it to be either the most important or a very important component of their faith. See Saied R. Ameli & Arzu Merali, *HIJAB, MEANING, IDENTITY, OTHERIZATION, AND POLITICS: BRITISH MUSLIM WOMEN* 18 (Islamic Human Rights Commission 2006). In essence, the proposed amendment to MRE 611 would enable judges to force these women to choose between their religious beliefs and their ability to testify in court.

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<sup>1</sup> In actuality, the plaintiff was wearing a niqab, which is a veil that covers the hair and face except for the eyes. In contrast, a hijab is a headscarf that generally covers only the hair.

<sup>2</sup> A burka or burqa generally covers the entire body.

## **THE PROPOSED AMENDMENT WOULD VIOLATE THE RELIGIOUS FREEDOM RIGHTS OF INDIVIDUALS SEEKING JUSTICE IN THE MICHIGAN COURTS IF IT IS APPLIED AS INTENDED**

As it is currently written, the amended court rule threatens to deny the fundamental right of access to the courts based on individuals' religious beliefs. Indeed, if the proposed MRE 611 is applied in the manner intended by its drafters, it would violate the Michigan Constitution.

As explained below, under the Free Exercise Clause of the Michigan Constitution, the government cannot substantially burden a person's religious practice unless doing so is the least restrictive means of serving a compelling government interest. Although the government has a compelling interest in identifying a witness and assessing her credibility, requiring that it do so through a visual examination of the witnesses' facial expressions is not narrowly tailored to this interest. A woman's identity can be verified by a female court officer in a separate room, which would satisfy Muslim women's religious beliefs provided that the verification took place out of the view of male officers.

Further, Michigan courts routinely accept testimony notwithstanding the trier of facts' inability to visually assess the speaker's credibility in a variety of situations. For example, under the Michigan Rules of Evidence, an absent witness's deposition testimony or former testimony from a separate trial can be read into evidence. See MRE 804(b)(1) & (5). Moreover, the trier of fact can determine the credibility of a witness using numerous other cues, including the testimony's internal consistency, the tone of the witness's voice and the nature of her gestures. In fact, numerous scientific studies highlight that we accurately determine veracity more frequently when we use these alternative means rather than visual cues. Given these alternative means to identify and assess the veracity of women wearing religiously mandated veils, denying these women the ability to testify would violate the Michigan Constitution.

### **A. The Michigan Constitution Affords Strong Protection to the Free Exercise of Religion**

Under the Michigan Constitution, "[e]very person shall be at liberty to worship God according to the dictates of his own conscience" and "the civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief." Const 1963, art 1, § 4. The Michigan Courts have prioritized the protection of the free exercise of religion, which they have described as one of our most fundamental rights. See *People v DeJonge*, 442 Mich 266, 278; 501 NW2d 127, 134 (1993); *Porth v Roman Catholic Diocese of Kalamazoo*, 209 Mich App 630, 635; 532 NW2d 195, 198 (1995). As the Michigan Supreme Court emphasized

This fortification of the right to the free exercise of religion was heralded as one of the Bill of Rights' most important achievements. Indeed, Jefferson proclaimed that "[n]o provision in our constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority."

*DeJonge*, *supra* at 278.

It is well established that Michigan courts analyze state free exercise claims using a strict scrutiny test. See, e.g., *McCready v Hoffius*, 459 Mich 131, 143-44; 586 NW2d 723, 729 (1998)

*vacated and remanded in part on other grounds*, 459 Mich 1235 (1999). In so doing, they join over twenty other states that continue to apply a similarly high standard to state free exercise claims in the wake of *Employment Div, Dep't of Human Resources v Smith*, 494 US 872; 11- S Ct 1595 (1990) and *City of Boerne v Flores*, 521 US 507; 117 S Ct 2157 (1997).<sup>3</sup> Under this test, Michigan courts determine whether

- (1) The belief at issue is sincerely held;
- (2) The belief at issue is religiously motivated;
- (3) The regulation at issue burdens the exercise of the belief at issue;
- (4) A compelling state interest justifies the burden at issue; and
- (5) There is a less obtrusive form of regulation available to the state.

*Id.* at 144.

The claimant is required to prove that the state action in question burdens the exercise of her sincere and religiously motivated belief. However, a claimant's good faith characterization of the religiosity and sincerity of her belief is generally accepted, and "the threshold to find a sufficient burden is very slight." *DeJonge, supra* at 281, 284; *Dep't of Social Services v Emmanuel Baptist Pre-School*, 434 Mich 380, 401-02; 455 NW2d 1, 8-10 (1990). With respect to the third element of this test, a claimant need only show that state action either coerces her to violate her religious beliefs or penalizes religious activity by denying her an equal share of the rights, benefits and privileges enjoyed by other citizens. *DeJonge, supra* at 283-84. To satisfy this standard, "[t]he burden on religious liberty [] need not be overwhelming, because even subtle pressure diminishes the right of each individual to choose voluntary what to believe." *Id.* at 284 (internal quotation marks and alterations omitted).

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<sup>3</sup> Fourteen states have passed Religious Freedom Restoration Acts or Amendments codifying the strict scrutiny test for state free exercise claims after the *Smith* decision. See Ala Const Amend 622; Ariz Rev Stat Ann § 41-1493; Conn Gen Stat Ann § 52-571(b); Fla Stat Ann § 761.01 et seq; Idaho Code Annotated § 73-401 et seq; Ill Comp Stat Ann 35/1-35/99; Mo Ann Stat §§ 1.302 & 1.307; NM Stat Ann § 28-22-1 et seq; Okla Stat Ann tit 51, § 251; 71 Pa Cons Stat Ann § 2401; RI Gen Laws § 42-80.1-1 et seq; SC Code Ann § 1-32-10 et seq; Tex Civ Prac & Rem Code Ann § 110.001 et seq; Va Code Ann § 57-2.02. During this same period, an additional seven states' courts have explicitly interpreted their state constitutions to require the application of strict scrutiny to state free exercise claims. See *Catholic Charities of Sacramento, Inc v Superior Court*, 85 P3d 67, 91; 32 Cal4th 527 (Cal 2004); *Fortin v Roman Catholic Bishop of Portland*, 871 A2d 1208, 1227-28; 2005 ME 57 (Me 2005); *Attorney Gen v Desilets*, 636 NE2d 233, 235; 418 Mass 316 (Mass 1994); *State v Pedersen*, 679 NW2d 368, 373 (Minn Ct App 2004); *Humphrey v Lane*, 728 NE2d 1039, 1043; 89 Ohio St3d 62 (Ohio 2000); *Munns v Martin*, 930 P2d 318, 321; 131 Wash2d 192 (Wash 1997); *State v Miller*, 549 NW2d 235, 239; 202 Wis2d 56 (Wis 1996). Finally, another three states' supreme courts have explicitly determined that their state constitutions provided greater protection for the free exercise of religion than the Federal Constitution since *Smith*. See *Swanner v Anchorage Equal Rights Com'n*, 874 P2d 274, 280-81; (Alaska 1994); *City Chapel Evangelical Free Inc v City of South Bend*, 744 NE2d 443, 446 (Ind 2001); *State v Schwartz*, 689 NW2d 430, 441-42; 2004 SD 123 (SD 2004).

Once the claimant satisfies these requirements, the burden shifts to the government to prove that the action in question is essential to further a compelling interest. *Id.* at 286. In contrast to the light burden placed on the claimant, “only state interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.” *Emmanuel Baptist, supra* at 396 (internal quotation marks omitted). Moreover, the state must use specific evidence to affirmatively show that the challenged action is the least burdensome method to achieve its compelling interests. See *DeJonge, supra* at 294-95; *Emmanuel Baptist, supra* at 395-96, 402-05. If such an alternative exists, it must be adopted “even if some adverse effects occur” because “the importance of religious liberty outweighs such problems.” *DeJonge, supra* at 296 n.58. Thus, “it [i]s not quite sufficient for the state to show that an exemption would impair its ability to fully achieve its goals; an exemption [i]s required even at some slight sacrifice to the state’s objectives.” *Id.* (internal quotation marks omitted). Instead, the imposition of available alternatives can be avoided only if the government can show that their adoption would “unduly interfere” with the achievement of its compelling interest. *Id.*

**B. Forcing a Woman to Choose Between her Religious Attire and her Ability to Participate in Court Would Burden her Sincerely Held Religious Belief**

Although the veil means different things to different people, for those women who wear one based on their belief that their religion requires them to do so, the veil is “a critical factor of their being.” Natasha Bakht, *Objection Your Honor! Accommodating Niqab-Wearing Women in Courtrooms*, in *CULTURAL DIVERSITY AND LAW* at 4 (Ralph Grilo et. al. eds., forthcoming). The courts must accept a claimant’s “good faith characterization that [her] activity is grounded in religious belief because it is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.” *Emmanuel Baptist, supra* at 392 (internal quotation marks omitted).

Requiring a woman to sacrifice her religious beliefs to access the court penalizes her religious exercise by denying her an equal share of one of our most protected rights and privileges. “It is beyond dispute that the right of access to the courts is a fundamental right protected by the Constitution.” *Swekel v City of River Rouge*, 119 F3d 1259, 1261 (6<sup>th</sup> Cir 1997) (internal quotation marks omitted); see also *Tennessee v Lane*, 541 US 509, 523; 123 SCt 1978, 1988 (2004) (“The Due Process Clause also requires the States to afford certain civil litigants a ‘meaningful opportunity to be heard’ by removing obstacles to their full participation in judicial proceedings.”). As a result, making a woman’s ability to bring a lawsuit or to testify as a witness, contingent upon the removal of her niqab unquestionably constitutes a burden on this religious belief.

**C. Forcing a Woman to Remove her Veil in Violation of her Religious Beliefs is not the Least Obtrusive Manner Through Which the Courts can Assess her Credibility**

It is clear that the government has a compelling interest in generally assessing the credibility of a witness. Requiring a woman to reveal her face in violation of her religious beliefs, however, is not the least obtrusive manner in which the state can achieve this goal. There are numerous alternative methods, such as an analysis of vocal evidence and testimony consistency that can be used to achieve the same ends without disclosing a witness’s face. As a result, the implementation of the proposed amendment would unconstitutionally burden the free

exercise of religion. See *DeJonge, supra* at 294 (holding that the state regulation was unconstitutional notwithstanding the existence of a compelling government interest because it had failed to prove that the action in question was essential to that interest).

### **1. Admitting Testimony When the Declarant is Absent**

That the amendment is not essential to the government's compelling interest in determining credibility is illustrated by the numerous instances in which testimony can be admitted even though the speaker never appears in court. For example, under the Michigan Rules of Evidence, statements that are given at a former trial and deposition testimony are admissible even if the speaker herself does not testify. See MRE 804(b)(1) & (5). So too are statements (1) that describe an event as it is perceived while it is occurring, (2) that describe a startling event, (3) that describe a declarant's then existing state of mind or emotion or (4) that are made for the purpose of medical treatment. See MRE 803(1)-(4).

If these statements are admissible without even the presence of the declaring witness, then the inability to see the face of a witness should not be an absolute bar to her ability to testify in court. Surely, it is easier to determine a witness's credibility if the trier of fact can listen to the witness's voice and observe her gestures than, for example, when a lawyer reads an absent witness's prior deposition testimony into the record.

### **2. Blind Triers of Fact and Non-Emotive Witnesses**

The courts' treatment of blind jurors and judges further highlights that visual analysis is not essential to a credibility determination. New York courts have explicitly upheld the use of blind jurors in a jury trial, *People v Caldwell*, 603 NYS2d 713, 159 Misc2d 190 (1993), and several states have enacted statutes that expressly prohibit the exclusion of blind jurors solely based on their disability. See, e.g., Va Code Ann. § 8.01-337 (Virginia); VTCA Government Code § 62.104 (a) & (b) (Texas); Code 1976 § 14-7-810 (3) (South Carolina); MGLA 234 § 4 (Massachusetts). In so doing, these states have relied on the conclusion that "a long list of factors besides demeanor [can] be used in evaluating a witness' testimony." *Caldwell, supra* at 715.

Moreover, numerous respected federal, state and administrative judges are blind, including retired Judge Paul S. Teranes of the Wayne County Circuit Court. See *Galloway v Superior Court of District of Columbia*, 816 FSupp 12, 17 (DDC 1993) (noting "there are several active judges who are blind"). The nation's first blind federal trial judge, the Honorable Richard Conway Casey, directly addressed questions regarding his ability to measure credibility without looking at a witness during his confirmation hearings. He responded that visual elements could be distracting, and that the true measure of credibility was whether the details in the testimony fit together in a coherent, logical way. See Larry Neumeister, *Blind Federal Judge an Inspiration*, October 28, 2001, available at <http://www.jwen.com/rp/articles/blindjudge.html>. This reasoning, which led the United States Senate to confirm Judge Casey's nomination, should similarly be used to reject the adoption of the proposed amendment without the addition of an explicit exception for religious attire.

A corollary to the participation of triers of fact who cannot see is the participation of witnesses who are incapable of displaying their emotions through facial expressions. Stephen Hawking, one of the most celebrated and accomplished scientists of our generation, suffers from amyotrophic lateral sclerosis, which has rendered him almost completely paralyzed. Both Muhammad Ali and Michael J. Fox are suffering from Parkinson's disease, which significantly hinders their ability to control their own facial movements. Numerous American soldiers return home with permanent injuries, burns or scars that leave their faces immobile. It is highly unlikely that a court would prohibit any of these people from providing relevant testimony, and yet it would be very difficult to discern anything from their facial expressions. There is no reason why a woman in a niqab should be treated any differently.

### 3. Alternative Methods to Assess Credibility

The examples cited above reflect an understanding that there are a variety of different methods that one may use to assess credibility that do not require visual inspection of a witness's facial expressions, including "general bearing, conduct on the stand, demeanor, manner of testifying, such as candor or frankness, or the clearness of [the claimant's] statement, and even the intonation of her voice." *Danovitz v Portnory*, 399 Pa 599, 605; 161 A2d 146, 149 (1960); see also *Galloway, supra* at 17 ("[A]lthough a blind juror cannot rely on sight, the individual can certainly hear the witness testify, hear the quaver in a voice, listen to the witness clear his or her throat, or analyze the pause between question and answer, then add these sensory impressions to the words spoken and assess the witness' credibility.").

Critically, numerous empirical studies verify that these alternative methods are at least as accurate, if not more accurate, than our ability to visually perceive dishonesty. See, e.g., Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075 (July 1991) (collecting studies); Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157 (1993) (same). Highlighting our inability to use demeanor to gauge credibility, one study found that judges who attempted to determine credibility based on facial expressions were able to detect untruthfulness only 57% of the time. See Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCHOLOGIST 913, 916 (1991). Another found that individuals who received instructions "to concentrate on a speaker's tone of voice were significantly more skilled at discriminating truths from lies, [whereas] those who were told to pay close attention to visual behaviors [] performed no better than those who were given no instructions at all and markedly worse than those who were instructed to focus on vocal or paralinguistic cues." Blumenthal at 1199 (describing a study by Bella M. DePaulo et al, *Attentional Determinants of Success at Detecting Deception and Truth*, 8 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 273 (1982). Surveying over five decades of research, social psychologist Jeremy Blumenthal concluded, "identifiable cues to deception are present more often in the vocal channel than in the visual . . . especially [] in comparison of the voice to the face." Blumenthal at 1192-93.

At the very least, then, these studies illustrate that alternative methods allow triers of fact to assess credibility without seeing a witness's face. At the most, they indicate that a reliance on these alternative methods may actually lead to a *more* accurate credibility determination. See, e.g., Blumenthal at 1194-95. Either way, the existence of these viable alternatives render the

proposed amendment unconstitutional, as they demonstrate that requiring a woman to remove her niqab is not the least obtrusive means to achieve the government's compelling interests.

#### 4. Examples from Foreign Jurisdictions

Finally, several international forums have successfully adopted more flexible methods to balance the need to assess credibility and the need to respect a witness's right to exercise her religious beliefs. These international solutions emphasize the availability of less obtrusive alternatives that we can adopt domestically.

In New Zealand, policy makers adopted a statutory means of accommodation that authorizes judges to "permit a witness to give evidence 'in an alternate way' on the grounds of 'the linguistic or cultural background or religious beliefs of the witness.'" Bakht at 27-28 (quoting *Evidence Act 2006* (N.Z.), 2006/69, s.103). The Judicial Studies Board of Britain<sup>4</sup> released a memorandum to guide judges in situations involving a witness who wears a veil. See Judicial Studies Board, Equal Treatment Advisory Committee, *Guidance on Wearing of the Veil or Niqab in court*, Ch. 3.3 at 2 (March 2008 Updated) [hereinafter JSB]. Emphasizing that "there is room for diversity in our system of justice and there should be a willingness to accommodate different practices and approaches to religious cultural observances," the guide exhorts that it should not be assumed "without good reason that it is inappropriate for a women to give evidence in court wearing the full veil." JSB at 3, 6. Instead, a judge should make every effort to allow a woman to testify in the religious clothing of her choosing, and in the unique situations where he cannot, should explain his reasons fully on the record and allow the woman an opportunity to speak with her religious advisor before making a final decision. JSB at 3-4.

#### D. **Forcing a Woman to Remove her Veil in Violation of her Religious Beliefs is not the Least Obtrusive Manner Through Which the Courts can Verify her Identity**

The second stated goal of the proposed amendment is to ensure the accurate identification of testifying witnesses. It is clear that the government has a compelling interest in verifying the identity of a witness. Yet again, however, requiring a woman to reveal her face in violation of her religious beliefs is not the least obtrusive manner in which the state can achieve this goal. Instead, a woman's identity can be verified by a female court officer in a separate room. This alternative will satisfy the government's legitimate practical concerns while simultaneously respecting the woman's religious beliefs. See, e.g., Tilly Rubens, *Should the Veil be Worn in Court?*, TIMES ONLINE, Feb. 6, 2007 available at <http://business.timesonline.co.uk/tol/business/law/article1331659.ece>.

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<sup>4</sup> The JSB is directly responsible for training full and part time judges in England and Wales.



**THE CONFRONTATION CLAUSE DOES NOT REQUIRE THE ADOPTION OF  
A RULE OF EVIDENCE THAT FORCES WITNESSES TO REMOVE ARTICLES OF  
CLOTHING WORN BECAUSE OF A SINCERELY HELD RELIGIOUS BELIEF**

Because MRE 611 applies to both civil and criminal cases, it is important to clarify that our position is entirely consistent with the Confrontation Clause.<sup>5</sup> Under the Sixth Amendment, made applicable to the states under Fourteenth Amendment, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” US Const, Am VI.<sup>6</sup> Clearly, this amendment could never be implicated in situations involving witnesses in civil trials or criminal defense witnesses because no “confrontation right” exists in such instances. Critically, however, this amendment *also* does *not* require the adoption of a rule of evidence that forces witnesses to remove their niqab when they testify for the prosecution in a criminal trial.

“[T]he principal evil at which the Confrontation Clause was directed was the civil law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.” *Crawford v Washington*, 541 US 36, 50; 124 S Ct 1354 (2004) (Scalia, J); see also *Maryland v Craig*, 497 US 836, 845; 110 S Ct 3157 (1990) (“The central concern of the Confrontation Clause is to ensure the reliability of evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”). To that end, *Crawford*’s majority opinion repeatedly emphasizes that cross examinations are a dispositive requirement of the Sixth Amendment, noting that this amendment commands “that reliability be assessed in a particular manner: by testing on the crucible of cross examination.” *Crawford*, *supra* at 61; see also *id.* at 54-69. Allowing a woman to testify in niqab does not disturb this procedural guarantee; such a witness would still be subject to a full cross examination where the defendant could zealously attempt to expose her accusations as a lie.

The Confrontation Clause also protects the right of a criminal defendant to physically face those who testify against him in a “face-to-face” confrontation. See, e.g., *Coy v Iowa*, 487 US 1012, 1016-17; 108 S Ct 2798 (1988). Here too, however, a woman’s religiously-motivated decision to wear a niqab would not violate the Sixth Amendment. A “face-to-face” confrontation does not necessitate that the witness’s entire face actually be exposed. Instead, as Professor Richard Friedman explains, “[t]he aspect of confrontation that is essential is the presence of the accused with the witness when she gives her testimony.” Richard Freidman, *Confrontation and the Niqab*, THE CONFRONTATION BLOG, Feb 4, 2009 *available at*

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<sup>5</sup> It is worth noting that the ACLU, as a defender of the Bill of Rights, is a strong advocate of the Confrontation Clause and the rights of criminal defendants.

<sup>6</sup> The Michigan Constitution contains a similar provision protecting a criminal defendant’s confrontation rights. See Const 1963 Art 1 § 20 (“In every criminal prosecution, the accused shall have the right . . . to be confronted with the witnesses against him or her.”). Michigan Courts routinely treat the protections afforded by the Federal and Michigan Confrontation Clauses as co-extensive. See, e.g. *People v Washington*, 468 Mich 667; 664 NW2d 203 (2003); *People v Tolbert*, No 262792, 2006 WL 2924577, at \*1 (Mich App, Oct 12, 2006) (unpub op) (noting that the “Michigan Constitution also guarantees the same right” as the federal Confrontation Clause).

<http://confrontationright.blogspot.com/2009/02/confrontation-and-niqab.html#comments>.<sup>7</sup> This is because the “very object” of the Confrontation Clause “is to place the witness under the sometimes hostile glare of the defendant.” *Craig, supra* at 866 (Scalia, J dissenting). As Justice Scalia has repeatedly emphasized,

A witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being the man is. It is always more difficult to tell a lie about a person to his face than behind his back.

*Coy, supra* at 1019 (internal quotation marks omitted); see also *Craig, supra* at 861 (Scalia, J dissenting) (highlighting the constitutional need to allow a parent the opportunity “to sit in the presence of the child” and cross examine her before convicting the former of sexually abusing the latter). For this reason, “the phrase still persists, ‘look me in the eye and say that.’” *Coy, supra* at 1018. A witness’s decision to wear a niqab does not prevent a defendant from requiring her to do just that. Such a witness still must look at, and be looked at by, the defendant while stating her testimony. Professor Friedman explains

The witness can still look the accused in the eye when she gives her testimony; presumably her view is unobstructed, and if his presence carries with it a reminder of her obligation to tell the truth I don't believe the niqab lessens that message. And he can see her eyes and hear her voice. I think he's getting an opportunity to be confronted with her.

See Friedman, *Confrontation and the Niqab, supra*. Consequently, neither objective of the Confrontation Clause requires that a witness testifying for the prosecution in a criminal case remove her niqab in order to be able to do so.

A quick hypothetical illustrates the practicality of this legal conclusion. The plaintiff in the underlying case that triggered the proposed amendment, Ms. Ginnah, was attempting to bring a civil claim. But what if Ms. Ginnah was the victim of a criminal act? What if she were a survivor of rape? In order to bring a criminal claim against her assailant, she would have to subject herself to cross examination and be physically present at trial. Yet so long as she satisfied these requirements, her actions would comport with the Sixth Amendment. To hold any differently would necessarily mean that assailants could rape women who wear a niqab with impunity. Neither the language of, nor the policy behind, the Confrontation Clause requires such a result.

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<sup>7</sup> Although Professor Friedman’s original article commented on case arising in Canada, during a follow up interview with the ACLU he indicated that his comments were equally applicable to an American context.

## CONCLUSION

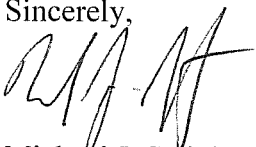
If the amendment is applied as intended, it will violate the Free Exercise Clause of the Michigan Constitution. As it is currently written, the amendment empowers judges to prevent women who wear a niqab from participating in our court system solely because they refuse to abandon their religious beliefs. A witness's ability to testify cannot be made contingent upon the violation of her religious beliefs. The needs to assess a witness's credibility and to verify her identity cannot justify such a heavy burden where there are numerous, more effective methods to achieve these goals. After all, "Themis, the goddess of justice, wears a blindfold for a reason." Steven Lubet, *When does a Muslim Veil Become a Poker Face? A Judge who Insisted a Woman Remove her Niqab was Wrong*, THE CHICAGO SUN TIMES, Mar. 11, 2007 at B2.

To comport with the protection of religious freedoms embodied in our state Constitution, the ACLU strongly encourages the Court to add the following language to the end of the proposed amendment of MRE 611:

Provided, however, that no person shall be precluded from testifying on the basis of clothing worn because of a sincerely held religious belief.

This addition will clarify that judges must make an exception to allow witnesses to testify in their religiously required attire such as a niqab or hijab. We appreciate the opportunity to offer these thoughts for the Court's consideration. Please feel free to contact us with any further questions.

Sincerely,



Michael J. Steinberg, Legal Director  
American Civil Liberties Union of Michigan

American-Arab Anti-Discrimination Committee of Michigan  
American Jewish Congress

Arab Community Center for Economic and Social Services

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## **Appendix of Organizations**

### **American-Arab Anti-Discrimination Committee of Michigan**

ADC, which is non-sectarian & non-partisan, is the largest Arab-American grassroots civil rights organization in the United States. It was founded in 1980 by former U.S. Senator James Abourezk and has chapters nationwide, with the ADC Michigan Office servicing the largest concentration of Arab-Americans in the Nation.

ADC is at the forefront in combating defamation and negative stereotyping of Arab Americans in the media and wherever else it is practiced. In doing so, it acts as an organized framework through which Arab Americans can channel their efforts toward unified, collective and effective advocacy; by promoting more balanced policies and serving as a reliable source for the news media and educators. By hosting events including: the annual Martin Luther King Jr. Scholarship Awards reception, the annual Judges Night reception, the annual Kids Club Celebration of Diversity, and the bi-monthly BRIDGES (Building Respect in Diverse Groups to Enhance Sensitivity) initiative, and in offering Diversity Training, ADC Michigan has made great strides in correcting anti-Arab stereotypes, humanizing the image of the Arab Americans, and contributing to effective policies and laws. In all these efforts, ADC coordinates closely with other civil rights and human rights organizations on issues of common concern.

### **American Civil Liberties Union of Michigan**

The American Civil Liberties Union of Michigan is our state's guardian of liberty, working daily in the courts, legislature and communities to defend the Bill of Rights and U.S. Constitution. The defense of civil liberties knows no party bounds, which is why the ACLU remains nonpartisan. We have joined in coalition with conservatives and progressives alike on a wide array of issues – from reforming the intrusive powers of the Patriot Act to blocking infringements upon our First Amendment rights. The ACLU of Michigan's mission remains realizing the promise of the Bill of Rights for all and expanding the reach of its guarantees to new areas. Through a variety of channels — public education, advocacy, organizing, and litigation — the ACLU is the premier civil rights organization in our country, earning widespread respect and admiration for its consistent defense of constitutionally based principles. The ACLU of Michigan is committed to supporting this message within our fair state.

### **American Jewish Congress**

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, religious, and economic rights of American Jews. Those rights can be protected effectively only if the rights of all are protected. The proposed rule burdens--indeed targets—a religious practice that most American Jews find distasteful, but which is nonetheless entitled to full respect from government absent compelling reasons generally applicable. The attached statement demonstrates that the proposed rule fails even the lower test of simple rationality.

## **Arab Community Center for Economic and Social Services**

ACCESS is a human services organization committed to the development of the Arab American community in all aspects of economic and cultural life. ACCESS helps low-income families, as well as newly arrived immigrants adapt to life in America. Its goal is to foster a greater understanding of Arab Culture in the U.S. and in the Arab world. ACCESS provides a wide range of social, mental health, educational, artistic, employment, legal, and medical services, and is dedicated to empowering people to lead more informed, productive, and fulfilling lives.

## **Baptist Joint Committee for Religious Liberty**

The Baptist Joint Committee for Religious Liberty ("BJC") serves fifteen cooperating Baptist conventions and conferences in the United States, with supporting congregations throughout the nation, including dozens in Michigan. BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans.

## **Council on American-Islamic Relations – Michigan**

The Council on American-Islamic Relations - Michigan (CAIR-MI) is a chapter of America's largest Islamic civil liberties group, which has 35 offices and chapters nationwide and in Canada. Its mission is to enhance the understanding of Islam, encourage dialogue, protect civil liberties, empower American Muslims, and build coalitions that promote justice and mutual understanding.

## **First Step**

First Step is an organization in Wayne County, MI that provides comprehensive services to support victims of domestic and sexual violence. First Step offers shelter, counseling, advocacy, assault response, 24-hour help line services, legal information, children's services, forensic exams (SANE), transitional supportive housing, training and education/prevention programs. Last year, First Step touched the lives of 15,493 people.

## **Jewish Council for Public Affairs**

The Jewish Council for Public Affairs ("JCPA"), the coordinating body of 14 national and 125 local Jewish federations and community relations councils, was founded in 1944 to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a just, democratic, and pluralistic society. The JCPA recognizes our security is linked inexorably to the strength of democratic institutions. The Jewish community has a direct stake – along with an ethical imperative – in assuring that America remains a country wedded to the Bill of Rights and committed to the rule of law, a nation whose institutions continue to function as a public trust.

## **KARAMAH**

KARAMAH: MUSLIM WOMEN LAWYERS FOR HUMAN RIGHTS is a charitable, educational organization that focuses on the domestic and global issues of human rights, especially those relating to Muslim women. KARAMAH is committed to research, education, and advocacy work on these issues specifically and human rights in Islam generally, as well as the Rule of Law, civil rights, and other related rights under the Constitution of the United States.

In pursuit of its goals, KARAMAH has participated as amicus curiae in some major human rights cases before the U.S. Supreme Court, and also effectively defended the Supreme Court within the Muslim community when the Rule of Law was threatened by the controversy over the portrayal of Prophet Muhammad on the frieze of the Supreme Court building. Furthermore, KARAMAH has stood for religious liberty generally and in particular within the Muslim community, arguing for the right of individuals to live their religion in accordance with their own interpretation of its teachings. This is particularly true of the veil issue where Muslims have developed various views on its necessity and extent.

### **Professor Douglas Laycock, Yale Kamisar Collegiate Professor of Law**

Douglas Laycock is the Yale Kamisar Collegiate Professor of Law at the University of Michigan. He has studied the law of religious liberty for more than thirty years and is widely recognized as one of the nation's leading scholars in the field. He is the author of more than fifty articles and book chapters on religious liberty issues. He has argued important religious liberty cases in the Supreme Court and elsewhere, and has been invited many times to testify as an expert on religious liberty before Congressional committees. He signs this statement in his individual capacity as a scholar; the University of Michigan takes no position on the proposed rule.

### **Legal Services of South Central Michigan**

Legal Services of South Central Michigan (LSSCM) is a private non-profit organization that provides free legal advice and representation to low-income persons and senior citizens (regardless of income) in certain civil legal cases. We provide general civil legal services to low-income and senior citizens of Barry, Branch, Calhoun, Clinton, Eaton, Hillsdale, Ingham, Jackson, Lenawee, Livingston, Monroe, Shiawassee, and Washtenaw counties. We also provide legal services to senior citizens of St. Joseph County. We also operate two statewide programs - Farmworker Legal Services (FLS), which provides services to migrant and seasonal farm workers and the Michigan Poverty Law Program (MPLP), which provides case consultation, training, technology and other support to local legal services programs throughout the state. LSSCM is committed to treating all applicants for service with respect. LSSCM policies prohibit discrimination in any aspect of the program or its services. LSSCM is staffed by attorneys, paralegals, legal assistants, law students, and community volunteers.

## **Associate Professor Ashley Lowe, Clinic Director of the Family Law Assistance Project**

The Family Law Assistance Project (FLAP) is a collaboration between Thomas M. Cooley Law School and Lakeshore Legal Aid. FLAP provides free family law legal services to low-income people in Oakland County, in cases involving custody, divorce, paternity and domestic violence. FLAP gives priority for direct representation services to those clients who are survivors of domestic violence, are being denied access to their children or experience barriers in accessing the legal system. FLAP's Clinical Director, Ashley Lowe, is an Associate Professor at Cooley Law School and has been representing survivors of domestic violence in family law matters for 10 years. Before founding FLAP, Professor Lowe was the Director of Legal Services at the Women's Survival Center in Oakland County.

## **Michigan Coalition Against Domestic & Sexual Violence**

MCADSV is a statewide membership organization whose members represent a network of over 70 domestic and sexual violence programs and over 200 allied organizations and individuals. We have provided leadership as the statewide voice for survivors of domestic and sexual violence and the programs that serve them since 1978. MCADSV is dedicated to the empowerment of all the state's survivors of domestic and sexual violence. Our mission is to develop and promote efforts aimed at the elimination of all domestic and sexual violence in Michigan. Our goals are to: (1) Provide statewide leadership on public policy issues affecting survivors and the programs that serve them; (2) Promote comprehensive, community based social change efforts to end domestic and sexual violence and build peaceful communities; (3) Promote the availability and accessibility of high quality, culturally relevant, domestic and sexual violence services and prevention programs; (4) Build capacity for community specific solutions to ending domestic and sexual violence; and (5) Encourage the leadership of women.

## **Michigan Conference of the United Church of Christ**

The Michigan Conference of the United Church of Christ is a faith community gathered in over one hundred sixty diverse congregations and has more than thirty-six thousand members. The purpose of the Conference is to be a united and uniting community of the people of God, covenanting together for mutual support and common mission. Its denomination, the United Church of Christ, is a "mainline" Protestant denomination in the Reformed tradition, and its history is witnessing to a long and profound commitment to peace seeking and advocacy for justice for all."

## **The Michigan Immigrant Rights Project**

The Michigan Immigrant Rights Project (MIRP) is a joint project of Legal Services of South Central Michigan and the Center for Civil Justice. MIRP focuses on the following objectives: technical and co-counsel assistance and training to Michigan legal aid and pro bono attorneys handling immigration and immigrant rights matters; systemic advocacy on behalf of Michigan's low-income immigrants and their families; legislative and legal development tracking and analysis; coalition-building among immigration assistance providers and immigrant advocacy organizations statewide; and support and training for domestic violence survivor attorneys and advocates regarding the rights of battered immigrants.

## **The Michigan Poverty Law Project**

Michigan Poverty Law Program (MPLP) is a cooperative effort between Legal Services of South Central Michigan and the University of Michigan Law School. The goals of MPLP are: to support the advocacy of Michigan legal services field programs; to coordinate advocacy for the poor among local legal services programs; and to assure that a full range of advocacy continues on behalf of the poor. MPLP provides state support services to local legal services programs and other poverty law advocates. MPLP works directly with local advocates through regular task force meetings that respond to locally-identified training needs; through frequent publications alerting advocates to legal developments; and through open access to case consultation, co-counseling, or referral for local advocates. MPLP is funded in part by the Michigan State Bar Foundation (MSBF) and the Legal Services Corporation (LSC).

## **SafeHouse Center**

SafeHouse Center is a non-profit organization dedicated to ending domestic violence and sexual assault in Washtenaw County, Michigan. SafeHouse provides free and confidential services for any person victimized that lives or works in Washtenaw County. Our programs include counseling, court accompaniment, information and referrals, emergency shelter and personal advocacy. SafeHouse provides services to all survivors of domestic violence and sexual assault regardless of ethnicity, race, sex, sexual orientation, gender identity, age, relationship status, veteran status, current or former substance use, current or former involvement with the criminal justice system, religious affiliation, immigration status, physical or mental ability, health status, height or weight.

## **Turning Point**

Turning Point has been serving the community for over 28 years. Our mission is to provide programs and resources that enable victims/survivors of domestic and sexual violence to regain control of their lives. Services consists of an emergency shelter, individual and group counseling, advocacy, Personal Protection Order Assistance Program, a Forensic Nurse Examiners Program for victims of sexual assault, and a Prevention Education Program. Last year Turning Point provided services to 5,164 individuals and answered over 14,000 crisis calls.